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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-6733 1975 Term

RICHARD GORDON,

PETITIONER

v.

NORTH CAROLINA,

RESPONDENT

****

On Writ of Certiorari

To the Supreme Court of North Carolina

****

PETITION FOR WRIT OF CERTIORARI

****

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Counsel for
Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

_____Term, 1975

No. _____

Richard Gordon,

Petitioner

v.

North Carolina,

Respondent

****

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF NORTH CAROLINA

****

The Petitioner, Richard Gordon, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of North Carolina, entered in this cause on May 6th, 1975.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at _____N. C. _____, 213S.E. 2d708 (1975). A copy of this opinion is appended to this petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina was made and entered on May 6, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. A., 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,

which district shall have been previously acsertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statute 14-17, Vol. 1B, Page 316. :

Murder in the first and second degree defined; punishment. A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury.

QUESTIONS PRESENTED

1. Should cases have been dismissed for lack of speedy trial?

2. Was evidence obtained by illegal search and seizure?

3. Was defendant's confession obtained in violation of defendant's constitutional rights?

4. Was death sentence unconstitutional in North Carolina on August 18, 1973?

STATEMENT OF THE CASE

This proceedure arises in the Supreme Court of North Carolina.

Petitioner was arrested on April 21, 1973 without a warrant for the first degree murders of Steve Helton and Sharon Williams on April 18th, 1974. Petitioner was tried and convicted and sentenced to death in each case in Mecklenburg County Superior Court, on May 29, 1974.

The cases were appealed to the North Carolina Supreme Court which rendered its opinion on May 6, 1975, affirming the Judgments of Mecklenburg County Superior Court, (A 1), three justices dissenting as to the death penalty (A14).

Two confidential informants who were previously unknown by police called the Charlotte Police Department and stated that two brothers, Ronnie and Raymond Young, who lived at 2725 Craddock Circle, had committed the two murders and that the weapons, a .45 caliber pistol, a shot gun with two barrells and a rifle described as larger than a .22 caliber, were placed in Apartment #3 where Ellen Gilmore and Brenda Berber reside.

That on August 21, ~~1974~~ 1973, between 1:30 and 2:00 A. M.,

twenty police officers armed with a search warrant surrounded Apartments #2 and #3, found a 30-30 rifle, a .22 caliber rifle and a sawed off shotgun in Apartment #3. That the police then knocked on the door of Apartment #2, that at that time police had not heard of the name of Richard Gordon and had no physical description of him. Defendant answered door clad only in his undershorts and police with their guns out rushed by defendant into the apartment and upstairs where they arrested Ronnie Young and Loriann Alexander and Amy Carelock for murder. Defendant was arrested for murder without a warrant.

That after being held incommunicado in a small room at the Police Station for over twelve hours and being questioned by police, Defendant signed a typed confession at 3:25 P. M. on that date, April 21, ~~1975~~ 1973. That after that, the police signed two warrants against the Defendant, charging him with the two murders.

Defendant testified on VOIR DIRE that when he was arrested, he was struck on several occasions with a flashlight, that his toes were stepped on, that he was not allowed to make a phone call, that he was given no food until he signed a statement at 3:25 P. M. That he was then given one sandwich and one carton of milk. That he was not warned of his rights until after he signed a statement and that he then signed a Waiver of Rights form. He misspelled his name because he knew he had been lied to. That he was sick and could not keep food on his stomach for some time after he was placed in the County Jail. That he saw the nurse and the doctor who gave him some

medicine for his stomach. That he could not read the confession.

Police testified that Defendant signed the Waiver of Rights form at 9:45 A. M. when he was read the full Miranda Warnings. Police denied that he was beaten, testified that he was given milk and a sandwich at noon. That when he was first questioned at 9:45, Defendant said he knew nothing about the murder. That later they read him a confession by Zack McCain in which he said that Defendant shot the boy and the girl. That Defendant said that was a lie, and that he would tell them how it really happened. That he then orally confessed. That when his statement was typed up, he signed the confession after he read it.

"Before pleading to the Bills of Indictment, Defendant moved to dismiss for failure of the State to afford him a speedy trial. Defendant assigns as error the denial of this Motion." (A-5)

The Defendant was arrested on August 21, 1973 and the case was called for trial on May 20, ~~1975~~ 1973. Defendant never requested a continuance.

The North Carolina Supreme Court in overruling this assignment of error said: ...."that additional time was needed to prepare this case because of the technical legal aspects involved, that the availability of Judge Ervin to try the case, because of the legal technicalities involved, was an important factor involved in setting the case for trial." (A-5)

Certain guns found in an adjoining apartment were offered into evidence. Defendant objected and moved to suppress for the reason that they had been seized in the course of an unlawful and unconstitutional search. This motion was overruled. The denial of this motion is the basis for Defendant's second assignment of error. (A-9)

The North Carolina Supreme Court said "Defendant had no standing to contest the search and seizure in this case." (A-9)

Defendant assigns as error the admission into evidence, over objection, of an in-custody inculpatory statementmade by him to the Charlotte Police Officers, Gibson and Thompson, after his arrest without a warrant.(A-10). The trial Court and North Carolina Supreme Court found that the arrest was proper and legal, but that even if the arrest had been illegal, this would not have made the statement inadmissible. (A-11)

Defendant moved in Arrest of Judgment because the death penalty was unconstitutional in North Carolina at the time of the commission of these crimes. This motion was overruled by Trial Court. The North Carolina Supreme Court in a four to three opinion affirmed that the death penalty was constitutional at that time. (A-13)

ARGUMENT

The decision below should be reviewed because Petitioner was not afforded due process and his constitutional rights were violated. There is a split of authority as to whether a statement obtained after an illegal arrest is ipso facto inadmissible.

1. Defendant's right to a speedy trial under the VI Amendment of the United States Constitution was denied in this case, when the State delayed the trial until a particular Judge (Sam Ervin III) became available to try the case. In Moore v. Arizona 94 S. Ct. 188(1973), the Court said, "the State Court was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging Petitioner's speedy trial claim. Barker v. Wingo expressly rejected the Motion that an affirmative

demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." Defendant did show in the present case that two possible witnesses for him had died prior to his trial. (A-5).

2. Petitioner contends that he did have standing to object to weapons found in an adjoining apartment being introduced in evidence at his trial, under Jones v. United States, 362 U.S.257,80S CT. 725 (1960). That he did not have to live at a place or be physically present at the time of search for his constitutional rights under the IV Amendment of the U. S. Constitution to be violated. Evidence for State was that Petitioner had left weapons in that apartment. Petitioner contends that the State did not have probable cause to search for weapons on the unsupported word of two informers, who had never given information to the Police before. That search warrant could not be issued on that basis and that search in this case was illegal with or without search warrant. In this case, police had a search warrant but State did not introduce it into evidence at trial, did introduce it for VOIR DIRE purpose only.

3. Petitioner contends that his in-custody inculpatory statement was obtained in violation of his constitutional rights under the Fifth Amendment, and the Sixth Amendment to the U. S. Constitution. That police had no probable cause for his arrest without a warrant for murder. Police had no description of Petitioner, did not have his name, and were looking for two brothers, Ronnie and Raymond Young, when they knocked on his door and arrested him at 1:30 A. M. on April 21, 1973.

In Jones v. United States, 362 U.S. 257, 80 S. Ct. 725 (1960) Mr. Justice Frankfurther, speaking for the Supreme Court said, " We there upheld an arrest without a warrant solely upon an informant's statement that the Defendant was peddling narcotics, as corroborated by the fact that the informant's description of the Defendant's appearance, and of where he would be on a given morning agreed with the officer's observations."

Although the trial Judge and the North Carolina Supreme Court held that the arrest was legal, the Supreme Court will review findings of fact by a State Court where a Federal right has been denied as a result of a finding shown by the record to be without evidence to support it. Minneapolis, St. Paul, + Sault Ste. Marie Railway Co. v. North Dakota ex Rel. McCue, 236 U. S. 585, 59 LED 735, 35 SCR 429, Rev'g 26nd 438, 145 N.W. 135.

The North Carolina Supreme Court said "Assuming arguendo, that the arrest was illegal, this would not have made the statement ipso facto involuntary and inadmissible". (A-11) Petitioner contends that this conflicts with the holding of the United States Supreme Court in Wong Sun v. United States, 321 U. S. 471,83 S.Ct. 407, 9 LED R-441 (1963).

The North Carolina Supreme Court in State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969) said, "We find no United States Supreme Court decision on this precise point since the decision in Wong Sun; however, the language used by the Supreme Court in Wong Sun has been interpreted by the State and lower Federal Appellate Courts so as to produce a definite split of authority."

"One line of authority holds that any confession made subsequent to an illegal arrest, regardless of its voluntariness, must be excluded."

"The other line of authority holds that Wong Sun does not require ipso facto the exclusion of a confession made following an illegal arrest. However , there is some disagreement as to the exact requirements of Wong Sun."

THIS PETITIONER PRAYS THE COURT to resolve this split of authority and to spell out that first line of authority above is the correct view. That in this case, the confession follow- an illegal arrest was inadmissable.

4. Petitioner's Motion in Arrest of Judgment because the death sentence at the time this crime was committed was unconstitutional and violated the Eighth and Fourteenth Amendments to the United States Constitution, was overruled by the trial Judge and affirmed by a four to three opinion of the North Carolina Supreme Court. This date (August 18, 1973) was after the decision in Furman v. Georgia, 408 U.S. 238,9L S. Ct. 2726, 33L ED 2D 346 (1972), but prior to the time that the N. C. Legislature amended General Statute 14-17 by taking away from the jury the right to recommend life imprisonment as punishment for First Degree Murder and leaving the sole penalty for said crime death.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petitioner for writ of Certiorari should be granted.

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Phone: 704-376-4621
Counsel for Petitioner

NO. 39

TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
Spring Term 1975

FILED
MAY 9 3 PM '75
IN THE OFFICE OF
CLERK OF SUPREME COURT
OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

RICHARD GORDON

From Mecklenburg

ORDER FOR STAY OF EXECUTION

Petition having been filed by the defendant above named through his attorney, Lacy W. Blue of Charlotte, North Carolina, for a stay of execution of the judgment and death sentence rendered by the Honorable Sam J. Ervin, III at the May 13, 1974 Schedule B criminal session of Mecklenburg County Superior Court, which judgment upon appeal was affirmed by the Supreme Court of North Carolina in its opinion filed May 6, 1975, execution being scheduled on the third Friday following the filing of the opinion which is May 23, 1975, and the defendant, through his attorney, having stated his intention to file a petition for writ of certiorari in the United States Supreme Court;

NOW, THEREFORE, it is ordered that execution of the judgment be and the same is hereby stayed pending further orders of this court.

It is further ordered that the defendant remain in the custody of the Director of the Department of Correction pending furtner orders of this court.

It is further ordered that a certified copy of this order be served on the Warden of Central Prison, Raleigh, North Carolina.

This the 9th day of May 1975.

Chief Justice of the Supreme Court of North Carolina

Served by delivering a certified copy of this order to Mr. Sam P. Garrison, Warden at Central Prison at Raleigh, North Carolina at 4:37 P m this 13th day of May 1975.

Marshal,
Supreme Court of North Carolina.

cc: The Honorable James E. Holshouser, Jr.

Mr. Lacy W. Blue, Attorney at Law

Mr. Jacob L. Safron, Assistant Attorney General

A TRUE COPY
ADRIAN J. NEWTON
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY _____ DEPUTY CLERK
14 May 19 75

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SUPREME COURT OF NORTH CAROLINA SPRING TERM 1975

STATE OF NORTH CAROLINA NO. 39-Mecklenburg

V.

RICHARD GORDON

Appeal by defendant from Ervin, J., at the 13th May, 1974, Schedule "B" Criminal Session of Mecklenburg Superior Court.

On indictments proper in form, defendant was convicted of the first degree murders of Steve Charles Helton and Sharon Williams. Defendant appeals from judgments imposing a sentence of death in each case.

The evidence for the State tends to show: On Friday, 17 August 1973, Steve Charles Helton was the evening manager and Sharon Williams was an employee of the Burger Chef Restaurant on Wilkinson Boulevard in Charlotte. The restaurant closed about 11:30 p. m. After locking the doors, Steve, Sharon, and two other employees cleaned the inside of the restaurant. At 11:53 P. M., they "clocked out," went outside, and picked up trash for a few minutes. Steve and Sharon then went to his automobile at the back of the parking lot and the other two employees, Stephanie Lynn Strawser and Donna Faye Bartlett, went to their automobiles, they saw flashes and heard popping noises and a sound"like a cannon" coming from the area of Steve's car. Stephanie and Donna saw two or three figures run from behind a dumpster to the corner of another building. Donna exclaimed, "Stephanie, they have been shot." The two girls were affraid to go to Steve's car because of the possibility there might "still be people back there." Instead they went to a nearby grocery store, called the police, and then returned to the Burger Chef with three "bag boys." There they found Steve lying beside his car and Sharon slumped over in the front seat.

Officer J. A. Pillion of the Charlotte Police Department arrived at the scene about 12:05 a.m. The window on the passenger side was broken and there were small indentations on the outside of the car door, just below the window, which appeared to be caused by shotgun pellets. There was a bullet hole about the center of the windshield and a large quantity of blood and glass inside the car.

Officer E. J. Booth of the Charlotte Police Department arrived on the scene about 12:07 a.m. He examined Steve and found but was unable to detect a pulse.

Other officers discovered fresh footprints in a red mud field behind the building next to the Burger Chef and followed them to a railroad track nearby. There they found an empty 12-gauge shotgun shell. Officers also discovered an empty 30-30 cartridge case in front of Steve's car. Someone had pulled wires loose above the engine of this car.

Ellen Barbara Gilmore had known defendant for about one year. She lived with her sister at 2725 Craddock Circle in Apartment 3, and he lived at the same address in Apartment No. 2. On 17 August 1973, she saw defendant about 8:30 p.m. She did not see him any more that night but had a conversation with him at about midnight through an open door between the apartments. Prior to 17 August, defendant sometimes kept a rifle in a zipper bag and a handgun in Ellen's living room closet. On Saturday, 18 August, she looked in the zipper bag in the closet and observed a sawed-off shotgun, a handgun and a "long gun."

At about 1:30 a.m. on 21 August 1973, approximately [illegible] Charlotte police officers, acting on an informant's tip, went to 2725 Craddock Circle and surrounded Apartments 2 and 3. Eight officers with a search warrant entered and searched Apartment 3. In the living room closet they found a .22-caliber rifle, a 30-[illegible] rifle, and a sawed-off 12-gauge shotgun. Shortly thereafter, approximately six officers entered Apartment 2. Defendant, who answered

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the door, was immediately arrested. The officers also arrested Ronnie Young and two women who were there. The officers found a .32-caliber pistol on a chair near defendant, and a "nightstick" belonging to a patrolman, which had been missing about two weeks.

Lori Ann Alexander, who had been living with defendant in his apartment since late July 1973, was one of the women arrested there on this occasion. She saw defendant and Ronnie Young leave about 9:30 p.m. on the night of the crimes and saw them return about 12:00 or 12:30 a.m. They did not say where they were going. Ronnie Young and defendant returned together, followed shortly by Zack McCain. Ronnie left after about fifteen minutes and Zack left shortly thereafter.

Lori Ann, defendant, Ronnie Young, and another woman were taken to the police station at approximately 3:00 a.m. on 21 August. At the police station, defendant was given the usual Miranda warnings, and signed a waiver of his rights about 9:45 or 10:00 a.m. At that time, defendant denied knowing anything about the murders. Officers questioned defendant at this time for about fifteen minutes. At approximately 2:30 p.m., the officers returned to defendant with a signed statement made by Zack McCain that implicated defendant in the murders. Defendant again waived his rights and signed a full confession at 3:10 p.m. to the effect that he went to the Burger Chef on the night of 17 August with Zack McCain and Ronnie Young, intending to "snatch a money bag" when the restaurant closed. He stated that before going to the Burger Chef they went next door to Apartment 3 and procured a 30-30 rifle, a .32-caliber pistol, and a 12-gauge sawed-off shotgun which he had previously left there. They then went to the Burger Chef and hid behind the dumpster for about an hour until the restaurant closed. They knew the car Steve was driving and Zack pulled some wires loose so the car would not start. While Steve was putting some trash in the dumpster, Zack saw that he did not have a moneybag and

said, "God Dammit" and shot the 30-30 rifle twice. Bennie Young fired the shotgun at the glass in the door of Steve's car and defendant emptied the .32-caliber pistol at the car. They all then ran down the railroad track and continued to defendant's apartment. There defendant, who had expected no shooting, told Zack to get out of his house and Zack left.

Dr. Hobart Wood, the medical examiner for Mecklenburg County, performed an autopsy on the bodies of the victims at approximately 9:00 a.m. on 13 August. He testified that death of each victim was extremely rapid, if not instantaneous, caused from wounds received from a .30-caliber rifle bullet. There were also several small pellet-type wounds on Sharon's body. Dr. Wood did not find any bullet in either body that he would describe as a .32-caliber bullet.

Frederick Mark Hurst, assigned to the Crime Laboratory, Firearms and Tool Markings Division, of the State Bureau of Investigation, performed microscopic tests and test-firings with the 30-30 rifle and sawed-off shotgun. These tests showed that, in his opinion, the empty 30-30 cartridge case found near the scene of the shooting and bullet fragments taken from the bodies of the victims were fired from defendant's 30-30 rifle, and that the empty shotgun shell found on the railroad track was fired from defendant's sawed-off shotgun.

Defendant offered no evidence.

Other facts pertinent to decision are set out in the opinion.

Attorney General JAMES H. CARSON, JR. and Assistant Attorneys General LESTER V. CHALMERS, JR. and SIDNEY S. EAGLES, JR. for the State.

LACY W. BLUE for defendant appellant.

Moore, Justice.

Before pleading to the bills of indictment, defendant moved to dismiss for failure of the State to afford him a speedy trial. Defendant assigns as error the denial of this motion.

In support of his motion, defendant introduced death certificates of two possible witnesses, Isaac Harris and Hattie Howze. Harris was shot on 15 January 1974, while robbing a store, and died on 19 January 1974. Howze was doused with gasoline and set on fire on 29 December 1973, and died on 30 December 1973. Defendant contends that had his cases been tried earlier, these two persons might have been helpful in the presentation of his defense. He offered no evidence as to what either of these persons would have testified had they been called as witnesses.

In opposition to defendant's motion to dismiss, the State offered the testimony of Thomas F. Moore, Jr., the District Attorney for the Twenty-Sixth Judicial District, who testified in part that from 21 August 1973 to 20 May 1974 approximately 70 weeks of criminal court were held in Mecklenburg County, with an average of about 100 persons awaiting trial at all times; that during this period approximately 1200 cases were disposed of, including between 150 to 200 requiring jury trials; that it takes about four to six months to bring a jail case to trial in the county because of the condition of the docket; that it took two to three months longer to bring this case to trial because of pretrial publicity adverse to the defendant; that the delay was necessary in order to secure a fair trial for the defendant; that there were other criminal cases that did not receive the publicity this case received; that additional time was needed to prepare this case because of the technical legal aspects involved; that the availability of Judge Ervin to try the case, because of the legal technicalities involved, was an important factor involved in setting the case for trial.

The following facts were stipulated by the two Assistant District Attorneys representing the State and counsel for defendant:

"1. That the defendant, Richard Gordon, was arrested on this charge or these charges on August 21, 1973, and has been held in custody without privilege of bond since that date.

"2. That he was given a preliminary hearing in the Mecklenburg County District Court on September 26, 1973, and was bound over to Superior Court for trial on these charges at that time; that no bond was permitted by the District Court.

"3. That on November 5, 1973, the Grand Jury of Mecklenburg County returned a true bill against the defendant, Richard Gordon, in each case.

"4. That the defendant made a motion for speedy trial on April 11, 1974, and that the case was called for trial on Monday, May 20, 1974."

Based on the stipulation, the death certificates, and the testimony of District Attorney Moore, the trial judge made detailed findings of fact and then concluded as a matter of law:

"1. That the defendant has not been deprived of a speedy trial in the constitutional sense and that the defendant is not entitled to have this case dismissed, nor is he entitled to any other relief by virtue of his contention that he has been denied a speedy trial.

"2. That the evidence fails to disclose that the State has acted wilfully or that the State has been guilty of any neglect in its handling of the matter, the Court finding that the case has been called for trial on the first occasion on which it has been docketed and that there is no showing that the State handled this case in any fashion other than in the normal fashion in which serious criminal cases are handled and disposed of in Mecklenburg County Superior Court; that the defendant has failed to show that the fact that the case has not been called for trial prior to May 20, 1974, has in any wise prejudiced the defendant or that he has in any wise been harmed by virtue of the fact that the case was not called for trial prior to this date."

The right to a speedy trial has been considered by this Court in many cases, including State v. Frank, 284 N.C. 137, [illegible] S.E. 2d 169 (1973); State v. Harrell, 281 N.C. 111, 187 S.E. 2d 769 (1972); State v. Ball, 277 N.C. 714, 178 S.E. 2d 377 (1971); State v. Johnson, 275 N.C. 264, 167 S.E. 2d 274 (1969); State v. Cavallaro, 274 N.C. 480, 164 S.E. 2d 168 (1968); State v. Hollars, 266 N.C. 45, 145 S.E. 2d 309 (1965).

The Supreme Court of the United States has [illegible] the constitutional guaranty of a speedy trial in earlier cases, including United States v. Marion, 404 U.S. 307, 30 L.Ed. 2d [illegible], 92 S.Ct. 455 (1971); Dickey v. Florida, 398 U.S. 30, 26 L.Ed. 2d 26, 90 S.Ct. 1564 (1970); Smith v. Hooey, 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969); Klopfer v. North Carolina, 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967); United States v. Ewell, 383 U.S. 116, 15 L.Ed. 2d 627, 86 S.Ct. 773 (1966); Pollard v. United States, 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957); Beavers v. Haubert, 198 U.S. 77, 49 L.Ed. 950, 25 S.Ct. 573 (1905).

The length of delay is never per se determinative, although a delay of nine months, as in the present case, could contravene the defendant's right to a speedy trial under some circumstances. State v. Brown, 282 N.C. 117, 191 S.E. 2d 659 (1972).

The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. State v. Brown, supra; State v. Spencer, 281 N.C. 121, 187 S.E. 2d 779 (1972). ". . . But this right is necessarily relative and is consistent with delays under certain circumstances. [Citation omitted.]" State v. Spencer, supra.

As we said in State v. Harrell, supra:

> "The word speedy cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in a particular case. Four factors should be considered in determining the reasonableness of a delay: the length of the delay, the reason for the delay, prejudice to the defendant, and waiver by the defendant. [Citations omitted.]"

The congestion of criminal court dockets has been consistently recognized as a valid justification for delay. Crowded dockets, lack of judges or lawyers, and other factors, make some delays inevitable. State v. Brown, supra; State v. George, 271 N.C. 458, 156 S.E. 2d 845 (1967).

A delay from 21 August 1973, the date on which defendant was arrested, until 20 May 1974, the date of the trial, in view of the congested docket in Mecklenburg County, could hardly be considered "willful or oppressive." Pollard v. United States, supra. The burden is clearly on the accused to show that the delay was due to the neglect or willfulness of the prosecution. State v. Brown, supra; State v. Ball, supra; State v. Hatcher, 277 N.C. 300, 177 S.E. 2d 892 (1970); State v. Hollars, supra. Defendant has failed to carry that burden.

Defendant here apparently acquiesced in the delay until 11 April 1974--the date on which he first asked for a speedy trial. ". . . A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. [Citations omitted.]" State v. Johnson, supra.

The record is devoid of any evidence of prejudice although defendant did state that he had expected to call the two deceased persons as possible witnesses. He did not attempt to show what he expected to prove by them had they been available. Nothing in the record suggests that his ability to present his defense was in any way impaired by the delay or by the death of these persons.

Defendant's contention that he has been denied his right to a speedy trial is without merit. This assignment is overruled.

Prior to 17 August 1973, defendant sometimes left a rifle or pistol in Apartment 3 occupied by the two sisters, Ellen Gilmore and Brenda Barber, adjoining Apartment 2 in which defendant lived. On 18 August a shotgun, a pistol and a "long gun" in a zipper bag were seen by Ellen Gilmore in the closet of Apartment 3. On 21 August police officers, armed with a search warrant, went to Apartment 3, located and seized these guns. At trial they were identified by Ellen Gilmore as the ones or similar to the ones put in her closet by defendant. The State offered these guns in evidence. Defendant's

counsel objected and moved to suppress for the reason that it had been seized in the course of an unlawful and unconstitutional search. This motion was overruled. The denial of this motion is the basis for defendant's second assignment of error.

Defendant contends that although the officers had a search warrant it was not introduced in evidence, and also, contrary to the State's contention, that he does have standing to challenge the introduction into evidence of the 30-30 rifle and other weapons seized in Apartment 3. ". . . The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures. . . ." State v. Craddock, 272 N.C. 160, 158 S.E. 2d 25 (1967).

As stated by Chief Justice Burger in Brown v. United States, 411 U.S. 223, 36 L.Ed. 2d 208, 93 S.Ct. 1565 (1973):

> ". . . [T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of seized evidence at the time of the contested search and seizure. . . ."

The search warrant in the present case, although not introduced in evidence at trial, was introduced on the voir dire hearing and complied with the provisions of G.S. 15-26. See State v. Vestal, 278 N.C. 561, 180 S.E. 2d 755 (1971). Regardless of the validity of the search warrant, however, defendant had no standing to contest the search and seizure in this case. He was not on the premises at the time of the contested search and seizure; he had no proprietary or possessory interest in the premises, nor had he ever claimed any; and he was not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. Hence, the rights of defendant were not invaded by the

search of Apartment 3. This assignment is overruled.

Defendant next assigns as error the admission into evidence, over objection, of an in-custody inculpatory statement made by him to Charlotte Police Officers Gibson and Thompson after his arrest without a warrant. On defendant's objection to the introduction of the written statement, the trial court conducted an extensive voir dire hearing. Officer Gibson, Officer Travis, and the defendant testified. The court, considering this testimony and, by stipulation, the testimony of other officers who had testified prior to the voir dire hearing, made detailed findings of fact, covering nine pages in the record, and in part concluded:

> "That the defendant was properly advised of his constitutional rights in accordance with Miranda v. Arizona;
>
> "That considering the totality of the circumstances, the defendant's confession was freely, understandingly, knowingly, and voluntarily made and that it was not the result of undue influence, compulsion, duress, physical abuse, or promise of leniency, and the State is entitled to offer said confession in evidence against the defendant.
>
> "That the defendant knowingly waived his right to counsel, both orally and in writing."

The evidence on the voir dire hearing fully supports the findings that the defendant's confession was free and voluntary. Defendant was questioned on three occasions on 21 August. An identification card was filled out between 6:00 and 7:00 a.m. At that time he was not questioned concerning the crimes. At 9:45 a.m., defendant signed a waiver and was asked questions for ten to fifteen minutes. He then denied any knowledge of the murders. Defendant made a full confession about 3:15 p.m., after being questioned for twenty-five to thirty minutes. There was ample evidence that defendant was never promised anything or threatened in any way, and that defendant completely volunteered his statement. These findings, having support in the evidence, are conclusive on appeal. State v. Thompson, 285 N.C. 181, 203 S.E. 2d 781 (1974); State v. Frazier, 280 N.C. 181, 185 S.E. 2d 652 (1972); State v. Hill, 276 N.C. 1, 170 S.E. 2d 885 (1969); State v. Vickers, 274 N.C. 311, 163 S.E. 2d 481 (1968).

When the officers arrested defendant they had reasonable grounds to believe that defendant had committed the two murders and would evade arrest if not immediately taken into custody. Under these circumstances the arrest was proper, and the confession was in no wise tainted by an illegal arrest. G.S. 15-41 (repealed by Session Laws 1973, Chapter 1286, Section 26, effective July 1, 1974); State v. Dickens, 273 N.C. 537, 160 S.E. 2d 865 (1971); State v. Alexander, 279 N.C. 527, 184 S.E. 2d 274 (1971).

Assuming, arguendo, that the arrest was illegal, this would not have made the statement ipso facto involuntary and inadmissible. As Justice Branch stated in an excellent discussion of this point in State v. Moore, 275 N.C. 141, 166 S.E. 2d 53 (1969):

> "Both reason and weight of authority lead us to hold that every statement made by a person in custody as a result of an illegal arrest is not ipso facto involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility." (Emphasis added.)

The court, after carefully reviewing all the circumstances, found that the statement in question was voluntarily made. This assignment is overruled.

Defendant objected to the introduction into evidence of two fragments of bullets, a small shot pellet, an empty 30-30 cartridge, a fired shotgun shell, a box of shotgun shells, a box of 30-30 shells, a brown bag, and a .32-caliber pistol. Defendant contends that it was error to admit these items because they were obtained by an unreasonable search and seizure.

The fragments of bullets and the shot introduced were taken from the bodies of the victims. The empty 30-30 cartridge was found at the scene of the shooting immediately after the shooting occurred. Tracks leading from the scene of the shooting led to where the empty shotgun shell was found. Both the empty 30-30 cartridge and the empty shotgun shell were identified as having been fired from the rifle and shotgun found in Apartment 3. The box of

shotgun shells and the box of 30-30 cartridges were found with the shotgun and rifle. The .32-caliber pistol was found in Apartment 2 on a chair about two feet from where defendant was standing when arrested.

First, we note that, except for the .32-caliber pistol, these items were so located that defendant lacked standing to complain of any search, legal or otherwise. Brown v. United States, supra; State v. Craddock, supra. As to the .32-caliber pistol, it was seized incident to a lawful arrest and was in plain view of the arresting officer and was thus properly seized. Chimel v. California, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034, reh. den. 396 U.S. 869, 24 L.Ed. 2d 124, 90 S.Ct. 36 (1969); Harris v. United States, 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); Preston v. United States, 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964); State v. Riggsbee, 285 N.C. 708, 208 S.E. 2d 656 (1974); State v. Carey, 285 N.C. 509, 206 S.E. 2d 222 (1974). We find no merit whatever in this contention.

At the close of the evidence defendant moved for judgment as of nonsuit. This motion was overruled and defendant assigns this as error.

"If there is any evidence tending to prove the fact of guilt or which reasonably conduces to this conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt." 2 Strong, N.C. Index 2d, Criminal Law § 106 (1967); State v. Williams, 286 N.C. 422, ____ S.E. 2d ____ (1975); State v. Bell, 285 N.C. 746, 209 S.E. 2d 506 (1974). An examination of the evidence in this case convinces us that it was properly submitted to the jury.

While the evidence does not show that the shots fired by defendant from the .32-caliber pistol were the ones that killed Sharon Williams and Steve Melton, the record discloses that the

defendant was present at the scene for the purpose of aiding and abetting his companions in the commission of the crimes, and that he actively participated by firing his pistol into the car where one of the deceased was sitting. This was sufficient to require the submission of his cases to the jury. See State v. Rankin, 284 N.C. 219, 200 S.E. 2d 182 (1973); State v. Terry, 278 N.C. 204, 179 S.E. 2d 368 (1971); State v. Johnson, 272 N.C. 239, 158 S.E. 2d 95 (1967). This assignment is overruled.

Defendant finally contends that the death penalty was unconstitutional at the time of the commission of these crimes. We have carefully considered and rejected defendant's argument in numerous cases; e.g., State v. Noell, 284 N.C. 670, 202 S.E. 2d 750 (1974); State v. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974); State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973). We reaffirm our position as there set out. No useful purpose would be served by further elaboration here.

It is noted that the court's charge was not brought forward in the record. Therefore, it is presumed that the jury was clearly charged as to the law arising from the evidence as required by G.S. 1-180. 3 Strong, N.C. Index 2d, Criminal Law § 158 (1967); State v. Moore, 276 N.C. 142, 171 S.E. 2d 453 (1970); State v. Cooper, 273 N.C. 51, 159 S.E. 2d 305 (1968).

In view of the seriousness of the charges, we have carefully examined each of defendant's assignments of error. Our examination of the entire record discloses that the defendant has had a fair trial, free from prejudicial error.

No Error.

No. [illegible] - State v. [illegible] Spring Term 1975

Justice Lake dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in State v. Williams, 279 N.C. 472, 480, 212 S.E. 2d 113, 121 (1975), other than those relating to the effect of Section 3 of Chapter 1251 of the 1973 Session Laws.

FILED

MAY 6 1975

IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

No. 39 - State v Gordon

COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v Williams, 286 N.C. 422, 437, 212 S.E.2d 113, 122 (1975).

FILED
MAY 6 1976
IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

State v. Gordon - No. 39

Chief Justice Sharp dissents as to the death sentence and votes to remand for the imposition of a sentence of life imprisonment for the reasons stated in her dissenting opinion in State v. Avery, 286 N. C. 459, 472, 212 S. E.2d 142, 149 (1975).

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MAY 6 1975
IN THE OFFICE OF
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OF NORTH CAROLINA

SUPREME COURT, U. S.
FILED
SEP 8 1975
MICHAEL RODAK, JR., CLERK

74-6733

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-

* *

RICHARD GORDON,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

* *

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

* *

RESPONSE OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-

* *

RICHARD GORDON,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

* *

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

* *

RESPONSE OF RESPONDENT,
STATE OF NORTH CAROLINA,
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

* *

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 287 N.C. 118, 213 SE 2d 708 (1975), and is appended to Respondent's Response as Appendix A-1.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC Sec. 1257(3).

QUESTIONS PRESENTED

1. Should cases have been dismissed for lack of speedy trial?
2. Was evidence obtained by illegal search and seizure?
3. Was defendant's confession obtained in violation of defendant's constitutional rights?
4. Was death sentence unconstitutional in North Carolina on August 18, 1973?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.
2. This case involves N.C. General Statutes Secs. 14-17, 14-18, 15-41, 15-187 and 15-188.

STATEMENT OF CASE

Petitioner, Richard Gordon, was tried and convicted of two counts of first-degree murder at the May 13, 1974 Schedule "B" Session, Mecklenburg County Superior Court, Charlotte, North Carolina. Petitioner appealed his conviction to the North Carolina Supreme Court which, in its opinion filed May 6, 1975, affirmed petitioner's conviction and death sentence. Petitioner now seeks review in this Court upon Petition for Writ of Certiorari to review the judgment of the Supreme Court of North Carolina.

STATEMENT OF FACTS

The State-respondent adopts as its own as if fully set out herein the facts as stated by the North Carolina Supreme Court at pages 710, 711 (Southeastern Reporter) of its opinion in State v. Gordon, 287 N.C. 118, 213 SE 2d 708, a copy of which is attached to Respondent's response as Appendix A-1.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE CASES AGAINST THE DEFENDANT SHOULD HAVE BEEN DISMISSED FOR LACK OF A SPEEDY TRIAL.

The respondent respectfully submits that the petitioner's right to a speedy trial guaranteed him under the Sixth Amendment of the Constitution of the United States was not denied. The respondent submits that numerous decisions by the federal courts and the Supreme Court of North Carolina have established four interrelated factors to be considered in determining if

a defendant's right to a speedy trial has been violated. (1) The length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice resulting to defendant from the delay. Barker v. Wingo, 407 U.S. 514 (1972); United States v. Marion, 404 U.S. 307 (1971); Dickey v. Florida, 398 U.S. 30 (1970); United States v. Macino, 486 F. 2d 750 (7th Cir. 1973); State v. O'Kelly, 285 N.C. 368, 204 S.E. 2d 672 (1974); State v. Frank, 284 N.C. 137, 200 SE 2d 169 (1973); State v. Brown, 282 N.C. 117, 191 SE 2d 659 (1972); State v. Harrell, 281 N.C. 111, 187 SE 2d 789 (1972).

It is submitted that in applying the above factors (1) length of delay -- a period of approximately 9 months; (2) Reason for delay -- congestion of the criminal docket of Mecklenburg County, North Carolina; (3) assertion of right to a speedy trial -- defendant filed motion for a speedy trial on April 11, 1974, and the case was called for trial on May 20, 1974; (4) prejudice -- the record is devoid of any evidence of prejudice although defendant did state that he had expected to call the two deceased persons as possible witnesses. He did not attempt to show what he expected to prove by them had they been available. Nothing in the record suggests that his ability to present his defense was in any way impaired by the delay or by the death of those persons.

The respondent respectfully submits that, in balancing the above factors, the scales fall heavily in favor of this Court finding that the petitioner was not denied his right to a speedy trial and denying the petition.

II. PETITIONER HAS NO STANDING TO ASSERT THE RIGHTS GUARANTEED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Brown v. United States, 411 U.S. 223, 36 L.Ed 2d 208, 93 S.Ct. 1565 (1973) Chief Justice Burger speaking for the Court stated:

> "There is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure'.....'Fourth Amendment rights are personal rights, which like some other constitutional rights, may not be vicariously asserted. Simmons v. United States, 390 U.S. 377 (1968); Jones v. United States, 362 U.S. 257 (1960); Alderman v. United States, 394 U.S. 165, 174 (1969). See Wong Sun v. United States, 371 U.S. 471, 492 (1963)."

The record reveals that the defendant was not on the premises at the time of the search and seizure; he had no proprietary or possessory interest in the premises, nor had he ever claimed any; and he was not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the search and seizure.

III. THE PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION AFTER HIS ARREST WITHOUT A WARRANT.

The respondent respectfully submits that when the officers arrested the defendant they had reasonable grounds to believe that the defendant had committed two murders and would evade arrest if not immediately taken into custody, and that under these circumstances the arrest was proper and that the confession was in no wise tainted by an illegal arrest.

On the date of the arrest of the defendant, N.C. General Statute 15-41 was in effect which provided as follows:

> §15-41. When officer may arrest without warrant.--A peace officer may without a warrant arrest a person:
>
> (1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence;
>
> (2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody

The Respondent respectfully submits that the Petitioner's assertion of the Fourth and Fifth Amendment Rights under the United States Constitution with respect to the inculpatory statements made after his warrantless arrest but based on probable cause as found by the North Carolina Supreme Court distinguishes this case from Brown v. State of Illinois, ____ U.S. ____, No. 73-6650, filed June 26, 1975 by this court.

In State v. Jarrette, 284 N.C. 625, 202 SE 2d 721, Justice Lake speaking for the North Carolina Supreme Court stated:

> "An in-custody confession is competent if made voluntarily after the defendant has been given proper warning of his constitutional rights and has full knowledge thereof. State v. Chance, 279 N.C. 643, 661, 185 S.E. 2d 227; State v. Murray, 277 N.C. 197, 176 SE 2d 738; State v. Gray, 268 N.C. 69, 79, 150 SE 2d 1."

The respondent submits that the evidence on voir dire fully justified the trial court's finding that the interrogating officers observed all procedural safeguards in conducting the interrogation which preceded the confession. Miranda v. Arizona, 384 U.S. 436, 16 L.Ed 2d 694, and that the objections to the admission of the petitioner's confession were properly overruled.

IV. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

There is no valid reason for the Court to grant certiorari at this time to hear this question. This Court in the case of Fowler v. North Carolina, No. 73-7031 (October Term, 1974) granted certiorari to petitioner Jessie Thurmon Fowler to hear this identical question. Extensive briefs were submitted in that case and oral arguments were made before this Court on April 21, 1975. Reargument has been scheduled for the October 1975 Term of this Court. This question, therefore,

has been presented to the Court, has been accepted for hearing by the Court, oral arguments before the Court have already been made; and further arguments are to be made. Therefore, any decision in this case should be dependent on the outcome of the Fowler case, and the Petition to Grant Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the State-Respondent respectfully submits that certiorari should be denied.

Respectfully submitted this 5th day of September, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA upon the petitioner by depositing the same in the United States Mail, postage prepaid, addressed to:

Lacy W. Blue
Attorney at Law
Suite "B" Equity Building
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Charlotte, North Carolina 28202

This 5th day of September, 1975.

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APPENDIX A-1

STATE V. GORDON, 287 N.C. 118,
213 SE 2d 708

STATE of North Carolina

v.

Richard GORDON.

No. 39.

Supreme Court of North Carolina.

May 6, 1975.

Defendant was convicted in the Superior Court, Mecklenburg County, Sam J. Erwin, III, J., of first-degree murder, and he appealed. The Supreme Court, Moore, J., held that defendant was not entitled to reversal on ground of lack of speedy trial, where delay was due to congested criminal court docket and defendant acquiesced in portion of delay; that defendant did not have standing to contest search of neighbor's adjoining apartment in which he had no proprietary or possessory interest; that evidence showing that defendant was advised of his constitutional rights and waived right to counsel supported trial court's finding that defendant's confession was voluntary; that defendant's arrest without a warrant was proper in that officers had reasonable grounds to believe defendant had committed murders and would evade arrest if not immediately taken into custody; and that evidence of defendant's guilt was for jury.

No error.

Sharp, C. J., filed a dissenting opinion.

Copeland, J., filed a dissenting opinion.

Exum, J., filed a dissenting opinion.

1. Criminal Law ⇐573

Length of delay is never per se determinative of whether defendant has been denied a speedy trial.

2. Criminal Law ⇐573

Constitutional right to a speedy trial prohibits arbitrary and oppressive delays by prosecution.

3. Criminal Law ⇐576(2)

Congestion of criminal court dockets is a valid justification for delay in bringing defendant to trial.

4. Criminal Law ⇐576(2)

In view of congested criminal court docket, delay from August 21, 1973, date on which defendant was arrested, until May 20, 1974, date of trial, was not willful or oppressive so as to require reversal of conviction.

5. Criminal Law ⇐576(11)

Burden is on the accused to show that delay in bringing him to trial was due to neglect or willfulness of prosecution.

6. Criminal Law ⇐576(8)

Defendant who was arrested on August 21, 1973 but did not ask for a speedy trial until April 11, 1974 and who was brought to trial on May 20, 1974 acquiesced in delay for purposes of determining if conviction should be reversed because of lack of speedy trial.

7. Criminal Law ⇐576(8)

Where delay from August 21, 1973, date of defendant's arrest, until May 20, 1974, date of his trial, was due to congested criminal court docket and where defendant did not request a speedy trial until April 11, 1974, defendant was not entitled to have conviction reversed on ground of lack of speedy trial.

8. Searches and Seizures ⇐7(26)

Immunity to unreasonable searches and seizures is privilege personal to those whose rights thereunder have been infringed and they alone may invoke it against illegal searches and seizures.

9. Criminal Law ⇐394.5(4)

Guns found in apartment adjacent to defendant's apartment were not rendered inadmissible in murder prosecution because of alleged failure to introduce search warrant under which guns were seized, where

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search warrant which met statutory requirements was introduced on voir dire hearing. G.S. § 15–26.

10. Searches and Seizures ⇐7(26)

Defendant who was not on premises of apartment adjoining his apartment at time of search of neighbor's apartment and seizure of guns which he had stored at neighbor's apartment, who had no proprietary or possessory interest in such premises and never claimed any and who was not charged with an offense that included, as essential element of offense charged, possession of seized guns at time of challenged search did not have standing to challenge validity of search and seizure.

11. Criminal Law ⇐412.2(5)

Evidence showing, inter alia, that defendant was advised of his constitutional rights and waived his right to counsel orally and in writing and that defendant was never promised anything or threatened in any way supported trial court's finding that defendant's in-custody inculpatory statement to officers was free and voluntary, allowing its admission.

12. Arrest ⇐63.4(5)
Criminal Law ⇐519(8)

Where police officers at time they arrested defendant had reasonable grounds to believe he had committed two murders and would evade arrest if not immediately taken into custody, their arrest of defendant without warrant was proper and did not taint defendant's subsequent confession to police officers. G.S. § 15–41.

13. Criminal Law ⇐412.1(3)

Even if arrest without warrant was illegal, such did not render subsequently made inculpatory statement to police officers ipso facto involuntary and inadmissible.

14. Searches and Seizures ⇐7(26)

Where fragments of bullets and shot pellet were taken from bodies of victims, empty 30–30 cartridge case and empty shotgun shell were found near scene of shooting and box of shotgun shells and box of 30–30 cartridges were found in search of apartment of defendant's neighbor, defendant lacked standing to contend that items were inadmissible because they were obtained by an unreasonable search.

15. Searches and Seizures ⇐3.3(4)

Seizure of pistol which was seen by arresting officer on chair two feet from where defendant was standing when arrested was proper.

16. Criminal Law ⇐741(1)

If there is any evidence which tends to prove fact of guilt or which reasonably conduces to this conclusion as fairly logical and legitimate deduction and not such as merely raises a suspicion or conjecture of guilt, it is for jury to say whether they are convinced beyond a reasonable doubt of fact of guilt.

17. Homicide ⇐282

Even though evidence did not show that shots fired by defendant from .32-caliber pistol were ones that killed victims, where evidence showed that defendant was present at scene for purpose of aiding and abetting companions in commission of crimes and that he actively participated by firing pistol into automobile where one victim sat, question whether defendant was guilty of murder was for jury.

18. Homicide ⇐354

Death penalty imposed upon conviction of first-degree murder was not unconstitutional.

19. Criminal Law ⇐1144.14

Where court's charge was not brought forward in record on appeal from conviction, it would be presumed that jury was charged as to law arising from evidence. G.S. § 1–180.

On indictments proper in form, defendant was convicted of the first degree murders of Steve Charles Helton and Sharon Wil-

liams. Defendant appeals from judgments imposing a sentence of death in each case.

The evidence for the State tends to show: On Friday, 17 August 1973, Steve Charles Helton was the evening manager and Sharon Williams was an employee of the Burger Chef Restaurant on Wilkinson Boulevard in Charlotte. The restaurant closed about 11:30 p. m. After locking the doors, Steve, Sharon, and two other employees cleaned the inside of the restaurant. At 11:53 p. m., they "clocked out," went outside, and picked up trash for a few minutes. Steve and Sharon then went to his automobile at the back of the parking lot and the other two employees, Stephanie Lynn Strawser and Donna Faye Bartlett, went to their automobiles at the front of the parking lot. As Stephanie and Donna were starting their automobiles, they saw flashes and heard popping noises and a sound "like a cannon" coming from the area of Steve's car. Stephanie and Donna saw two or three figures run from behind a dumpster to the corner of another building. Donna exclaimed, "Stephanie, they have been shot." The two girls were afraid to go to Steve's car because of the possibility there might "still be people back there." Instead, they went to a nearby grocery store, called the police, and then returned to the Burger Chef with three "bag boys." There they found Steve lying beside his car and Sharon slumped over in the front seat.

Officer J. A. Williams of the Charlotte Police Department arrived at the scene about 12:05 a. m. The window on the passenger side was broken and there were small indentations on the outside of the car door, just below the window, which appeared to be caused by shotgun pellets. There was a bullet hole about the center of the windshield and a large quantity of blood and glass inside the car.

Officer H. J. Booth of the Charlotte Police Department arrived on the scene about 12:07 a. m. He examined Steve and Sharon but was unable to detect a pulse.

Other officers discovered fresh footprints in a red mud field behind the building next to the Burger Chef and followed them to a railroad track nearby. There they found an empty 12-gauge shotgun shell. Officers also discovered an empty 30-30 cartridge case in front of Steve's car. Someone had pulled wires loose about the engine of this car.

Ellen Barbara Gilmore had known defendant for about one year. She lived with her sister at 2725 Craddock Circle in Apartment 3, and he lived at the same address in Apartment 2. On 17 August 1973, she saw defendant about 8:30 p. m. She did not see him any more that night but had a conversation with him at about midnight through an open door between the apartments. Prior to 17 August, defendant sometimes kept a rifle in a zipper bag and a handgun in Ellen's living room closet. On Saturday, 18 August, she looked in the zipper bag in the closet and observed a sawed-off shotgun, a handgun and a "long gun."

At about 1:30 a. m. on 21 August 1973, approximately twenty Charlotte police officers, acting on an informant's tip, went to 2725 Craddock Circle and surrounded Apartments 2 and 3. Eight officers with a search warrant entered and searched Apartment 3. In the living room closet they found a .22-caliber rifle, a 30-30 rifle, and a sawed-off 12-gauge shotgun. Shortly thereafter, approximately six officers entered Apartment 2. Defendant, who answered the door, was immediately arrested. The officers also arrested Ronnie Young and two women who were there. The officers found a .32-caliber pistol on a chair near defendant, and a "nightstick" belonging to a patrolman, which had been missing about two weeks.

Lori Ann Alexander, who had been living with defendant in his apartment since late July 1973, was one of the women arrested there on this occasion. She saw defendant and Ronnie Young leave about 9:30 p. m. on the night of the crimes and saw them return about 12:00 or 12:30 a. m. They did not say where they were going. Ronnie Young and defendant
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Young and defendant returned together, followed shortly by Zack McCain. Ronnie left after about fifteen minutes and Zack left shortly thereafter.

Lori Ann, defendant, Ronnie Young, and another woman were taken to the police station at approximately 3:00 a. m. on 21 August. At the police station, defendant was given the usual *Miranda* warnings, and signed a waiver of his rights about 9:45 or 10:00 a. m. At that time, defendant denied knowing anything about the murders. Officers questioned defendant at this time for about fifteen minutes. At approximately 2:30 p. m., the officers returned to defendant with a signed statement made by Zack McCain that implicated defendant in the murders. Defendant again waived his rights and signed a full confession at 3:10 p. m. to the effect that he went to the Burger Chef on the night of 17 August with Zack McCain and Ronnie Young, intending to "snatch a money bag" when the restaurant closed. He stated that before going to the Burger Chef they went next door to Apartment 3 and procured a 30–30 rifle, a .32-caliber pistol, and a 12-gauge sawed-off shotgun, which he had previously left there. They then went to the Burger Chef and hid behind the dumpster for about an hour until the restaurant closed. They knew the car Steve was driving and Zack pulled some wires loose so the car would not start. While Steve was putting some trash in the dumpster, Zack saw that he did not have a moneybag and said, "God Dammit" and shot the 30–30 rifle twice. Ronnie Young fired the shotgun at the glass in the door of Steve's car and defendant emptied the .32-caliber pistol at the car. They all then ran down the railroad track and continued to defendant's apartment. There defendant, who had expected no shooting, told Zack to get out of his house and Zack left.

Dr. Hobart Wood, the medical examiner for Mecklenburg County, performed an autopsy on the bodies of the victims at approximately 9:00 a. m. on 18 August. He testified that death of each victim was extremely rapid, if not instantaneous, caused from wounds received from a .30-caliber rifle bullet. There were also several small pellet-type wounds on Sharon's body. Dr. Wood did not find any bullet in either body that he would describe as a .32-caliber bullet.

Frederick Mark Hurst, assigned to the Crime Laboratory, Firearms and Tool Markings Division, of the State Bureau of Investigation, performed microscopic tests and test-firings with the 30–30 rifle and sawed-off shotgun. These tests showed that, in his opinion, the empty 30–30 cartridge case found near the scene of the shooting and bullet fragments taken from the bodies of the victims were fired from defendant's 30–30 rifle, and that the empty shotgun shell found on the railroad track was fired from defendant's sawed-off shotgun.

Defendant offered no evidence.

Other facts pertinent to decision are set out in the opinion.

Atty. Gen. James H. Carson, Jr. and Asst. Attys. Gen. Lester V. Chalmers, Jr. and Sidney S. Eagles, Jr., Raleigh, for the State.

Lacy W. Blue, Charlotte, for defendant appellant.

MOORE, Justice.

Before pleading to the bills of indictment, defendant moved to dismiss for failure of the State to afford him a speedy trial. Defendant assigns as error the denial of this motion.

In support of his motion, defendant introduced death certificates of two possible witnesses, Isaac Harris and Mattie Howze. Harris was shot on 15 January 1974, while robbing a store, and died on 19 January 1974. Howze was doused with gasoline and set on fire on 29 December 1973, and died on 30 December 1973. Defendant contends that had his cases been tried earlier, these two persons might have been helpful in the presentation of his defense. He offered no evidence as to what either of these persons

would have testified had they been called as witnesses.

In opposition to defendant's motion to dismiss, the State offered the testimony of Thomas F. Moore, Jr., the District Attorney for the Twenty-Sixth Judicial District, who testified in part that from 21 August 1973 to 20 May 1974 approximately 70 weeks of criminal court were held in Mecklenburg County, with an average of about 100 persons awaiting trial at all times; that during this period approximately 1200 cases were disposed of, including between 150 to 200 requiring jury trials; that it takes about four to six months to bring a jail case to trial in the county because of the condition of the docket; that it took two to three months longer to bring this case to trial because of pretrial publicity adverse to the defendants; that the delay was necessary in order to secure a fair trial for the defendant; that there were other criminal cases that did not receive the publicity this case received; that additional time was needed to prepare this case because of the technical legal aspects involved; that the availability of Judge Ervin to try the case, because of the legal technicalities involved, was an important factor involved in setting the case for trial.

The following facts were stipulated by the two Assistant District Attorneys representing the State and counsel for defendant:

"1. That the defendant, Richard Gordon, was arrested on this charge or these charges on August 21, 1973, and has been held in custody without privilege of bond since that date.

"2. That he was given a preliminary hearing in the Mecklenburg County District Court on September 26, 1973, and was bound over to Superior Court for trial on these charges at that time; that no bond was permitted by the District Court.

"3. That on November 5, 1973, the Grand Jury of Mecklenburg County returned a true bill against the defendant, Richard Gordon, in each case.

"4. That the defendant made a motion for speedy trial on April 11, 1974, and that the case was called for trial on Monday, May 20, 1974."

Based on the stipulation, the death certificates, and the testimony of District Attorney Moore, the trial judge made detailed findings of fact and then concluded as a matter of law:

"1. That the defendant has not been deprived of a speedy trial in the constitutional sense and that the defendant is not entitled to have this case dismissed, nor is he entitled to any other relief by virtue of his contention that he has been denied a speedy trial.

"2. That the evidence fails to disclose that the State has acted wilfully or that the State has been guilty of any neglect in its handling of the matter, the Court finding that the case has been called for trial on the first occasion on which it has been docketed and that there is no showing that the State handled this case in any fashion other than in the normal fashion in which serious criminal cases are handled and disposed of in Mecklenburg County Superior Court; that the defendant has failed to show that the fact that the case has not been called for trial prior to May 20, 1974, has in any wise prejudiced the defendant or that he has in any wise been harmed by virtue of the fact that the case was not called for trial prior to this date."

The right to a speedy trial has been considered by this Court in many cases, including State v. Frank, 284 N.C. 137, 200 S.E.2d 169 (1973); State v. Harrell, 281 N.C. 111, 187 S.E.2d 789 (1972); State v. Ball, 277 N.C. 714, 178 S.E.2d 377 (1971); State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969); State v. Cavallaro, 274 N.C. 480, 164 S.E.2d 168 (1968); State v. Hollars, 266 N.C. 45, 145 S.E.2d 309 (1965).

The Supreme Court of the United States has also considered the constitutional guar-

anty of a speedy trial in various cases, including United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); Pollard v. United States, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957); Beavers v. Haubert, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed. 950 (1905).

[1] The length of delay is never *per se* determinative, although a delay of nine months, as in the present case, could contravene the defendant's right to a speedy trial under some circumstances. State v. Brown, 282 N.C. 117, 191 S.E.2d 659 (1972).

[2] The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. State v. Brown *supra*; State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972). ". . . But this right is necessarily relative and is consistent with delays under certain circumstances. [Citation omitted.]" State v. Spencer, *supra*.

As we said in State v. Harrell, *supra*:

"The word *speedy* cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in a particular case. Four factors should be considered in determining the reasonableness of a delay: the length of the delay, the reason for the delay, prejudice to the defendant, and waiver by the defendant. [Citations omitted.]"

[3] The congestion of criminal court dockets has been consistently recognized as a valid justification for delay. Crowded dockets, lack of judges or lawyers, and other factors, make some delays inevitable. State v. Brown *supra*; State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967).

[4, 5] A delay from 21 August 1973, the date on which defendant was arrested, until 20 May 1974, the date of the trial, in view of the congested docket in Mecklenburg County, could hardly be considered "willful or oppressive." Pollard v. United States, *supra*. The burden is clearly on the accused to show that the delay was due to the neglect or willfulness of the prosecution. State v. Brown, *supra*; State v. Ball, *supra*; State v. Hatcher, 277 N.C. 380, 177 S.E.2d 892 (1970); State v. Hollars, *supra*. Defendant has failed to carry that burden.

[6] Defendant here apparently acquiesced in the delay until 11 April 1974—the date on which he first asked for a speedy trial. ". . . A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. [Citations omitted.]" State v. Johnson, *supra*.

The record is devoid of any evidence of prejudice although defendant did state that he had expected to call the two deceased persons as possible witnesses. He did not attempt to show what he expected to prove by them had they been available. Nothing in the record suggests that his ability to present his defense was in any way impaired by the delay or by the death of those persons.

[7] Defendant's contention that he has been denied his right to a speedy trial is without merit. This assignment is overruled.

Prior to 17 August 1973, defendant sometimes left a rifle or pistol in Apartment 3, occupied by the two sisters, Ellen Gilmore and Brenda Barber, adjoining Apartment 2 in which defendant lived. On 18 August a shotgun, a pistol and a "long gun" in a zipper bag were seen by Ellen Gilmore in the closet of Apartment 3. On 21 August police officers, armed with a search warrant, went to Apartment 3, located and seized these guns. At trial they were iden-

tified by Ellen Gilmore as the ones or similar to the ones put in her closet by defendant. The State offered these guns in evidence. Defendant's counsel objected and moved to suppress for the reason that they had been seized in the course of an unlawful and unconstitutional search. This motion was overruled. The denial of this motion is the basis for defendant's second assignment of error.

[8] Defendant contends that although the officers had a search warrant it was not introduced in evidence, and also, contrary to the State's contention, that he does have standing to challenge the introduction into evidence of the 30–30 rifle and other weapons seized in Apartment 3. ". . . The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures. . . ." State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967).

As stated by Chief Justice Burger in Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973):

". . . [T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of seized evidence at the time of the contested search and seizure. . . ."

[9, 10] The search warrant in the present case, although not introduced in evidence at trial, was introduced on the *voir dire* hearing and complied with the provisions of G.S. § 15–26. *See* State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971). Regardless of the validity of the search warrant, however, defendant had no standing to contest the search and seizure in this case. He was not on the premises at the time of the contested search and seizure; he had no proprietary or possessory interest in the premises, nor had he ever claimed any; and he was not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. Hence, the rights of defendant were not invaded by the search of Apartment 3. This assignment is overruled.

Defendant next assigns as error the admission into evidence, over objection, of an in-custody inculpatory statement made by him to Charlotte Police Officers Gibson and Thompson after his arrest without a warrant. On defendant's objection to the introduction of the written statement, the trial court conducted an extensive *voir dire* hearing. Officer Gibson, Officer Travis, and the defendant testified. The court, considering this testimony and, by stipulation, the testimony of other officers who had testified prior to the *voir dire* hearing, made detailed findings of fact, covering nine pages in the record, and in part concluded:

"That the defendant was properly advised of his constitutional rights in accordance with Miranda v. Arizona;

"That considering the totality of the circumstances, the defendant's confession was freely, understandingly, knowingly, and voluntarily made and that it was not the result of undue influence, compulsion, duress, physical abuse, or promise of leniency, and the State is entitled to offer said confession in evidence against the defendant.

"That the defendant knowingly waived his right to counsel, both orally and in writing."

[11] The evidence on the *voir dire* hearing fully supports the findings that the defendant's confession was free and voluntary. Defendant was questioned on three occasions on 21 August. An identification card was filled out between 6:00 and 7:00 a. m. At that time he was not questioned

concerning the crimes. At 9:45 a. m., defendant signed a waiver and was asked questions for ten to fifteen minutes. He then denied any knowledge of the murders. Defendant made a full confession about 3:15 p. m., after being questioned for twenty-five to thirty minutes. There was ample evidence that defendant was never promised anything or threatened in any way, and that defendant completely volunteered his statement. These findings, having support in the evidence, are conclusive on appeal. State v. Thompson, 285 N.C. 181, 203 S.E.2d 781 (1974); State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972); State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969); State v. Vickers, 274 N.C. 311, 163 S.E.2d 481 (1968).

[12] When the officers arrested defendant they had reasonable grounds to believe that defendant had committed the two murders and would evade arrest if not immediately taken into custody. Under these circumstances the arrest was proper, and the confession was in no wise tainted by an illegal arrest. G.S. § 15–41 (repealed by Session Laws 1973, Chapter 1286, Section 26, effective July 1, 1975); State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971); State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971).

[13] Assuming, *arguendo*, that the arrest was illegal, this would not have made the statement *ipso facto* involuntary and inadmissible. As Justice Branch stated in an excellent discussion of this point in State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969):

> "Both reason and weight of authority lead us to hold that every statement made by a person in custody as a result of an illegal arrest is not *ipso facto* involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. *Voluntariness remains as the test of admissibility.*" (Emphasis added.)

The court, after carefully reviewing all the circumstances, found that the statement in question was voluntarily made. This assignment is overruled.

Defendant objected to the introduction into evidence of two fragments of bullets, a small shot pellet, an empty 30-30 cartridge, a fired shotgun shell, a box of shotgun shells, a box of 30-30 shells, a brown bag, and a .32-caliber pistol. Defendant contends that it was error to admit these items because they were obtained by an unreasonable search and seizure.

The fragments of bullets and the shot introduced were taken from the bodies of the victims. The empty 30-30 cartridge was found at the scene of the shooting immediately after the shooting occurred. Tracks leading from the scene of the shooting led to where the empty shotgun shell was found. Both the empty 30-30 cartridge and the empty shotgun shell were identified as having been fired from the rifle and shotgun found in Apartment 3. The box of shotgun shells and the box of 30-30 cartridges were found with the shotgun and rifle. The .32-caliber pistol was found in Apartment 2 on a chair about two feet from where defendant was standing when arrested.

[14, 15] First, we note that, except for the .32-caliber pistol, these items were so located that defendant lacked standing to complain of any search, legal or otherwise. Brown v. United States, *supra*; State v. Craddock, *supra*. As to the .32-caliber pistol, it was seized incident to a lawful arrest and was in plain view of the arresting officer and was thus properly seized. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, reh. den. 396 U.S. 869, 90 S.Ct. 36, 24 L.Ed.2d 124 (1969); Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 656 (1974); State v. Carey, 285 N.C. 509, 206 S.E.2d 222 (1974). We find no merit whatever in this contention.

At the close of the evidence defendant moved for judgment as of nonsuit. This motion was overruled and defendant assigns this as error.

[16] "If there is any evidence tending to prove the fact of guilt or which reasonably conduces to this conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt." 2 Strong, N.C. Index 2d, Criminal Law § 106 (1967); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974). An examination of the evidence in this case convinces us that it was properly submitted to the jury.

[17] While the evidence does not show that the shots fired by defendant from the .32-caliber pistol were the ones that killed Sharon Williams and Steve Helton, the record discloses that the defendant was present at the scene for the purpose of aiding and abetting his companions in the commission of the crimes, and that he actively participated by firing his pistol into the car where one of the deceased was sitting. This was sufficient to require the submission of his cases to the jury. *See* State v. Rankin, 284 N.C. 219, 200 S.E.2d 182 (1973); State v. Terry, 278 N.C. 284, 179 S.E.2d 368 (1971); State v. Johnson, 272 N.C. 239, 158 S.E.2d 95 (1967). This assignment is overruled.

[18] Defendant finally contends that the death penalty was unconstitutional at the time of the commission of these crimes. We have carefully considered and rejected defendant's argument in numerous cases; *e. g.*, State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). We reaffirm our position as there set out. No useful purpose would be served by further elaboration here.

[19] It is noted that the court's charge was not brought forward in the record. Therefore, it is presumed that the jury was clearly charged as to the law arising from the evidence as required by G.S. § 1-180. 3 Strong, N.C. Index 2d, Criminal Law § 138 (1967); State v. Moore, 276 N.C. 142, 171 S.E.2d 453 (1970); State v. Cooper, 273 N.C. 51, 159 S.E.2d 305 (1968).

In view of the seriousness of the charges, we have carefully examined each of defendant's assignments of error. Our examination of the entire record discloses that the defendant has had a fair trial, free from prejudicial error.

No error.

SHARP, Chief Justice, dissents as to the death sentence and votes to remand for the imposition of a sentence of life imprisonment for the reasons stated in her dissenting opinion in State v. Avery, 286 N.C. 459, 472, 212 S.E.2d 142, 149 (1975).

COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 437, 212 S.E.2d 113, 122 (1975).

EXUM, Justice, dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 439, 212 S.E.2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.